

UCC COMMITTEE  
REPORT  
on  
REVISED DIVISION NINE  
of the  
CALIFORNIA COMMERCIAL CODE  
and  
CALIFORNIA'S NON-UNIFORM PROVISIONS

*The UCC Committee of the Business Law Section  
of the State Bar of California\**

\*This Report has been a project of the UCC Committee carried out over a two-year period. Because it reflects the collective work of many individuals, including past as well as current members of the Committee, the Report is not signed by the current Committee membership or individual contributors. Nonetheless, the Committee gratefully acknowledges the specific contributions of Jerome A. Grossman, Frank T. Pepler, Eric R. Reimer, Jeffrey L. Schaffer and Harry C. Sigman.

## INTRODUCTION

Senate Bill 45, enacted October 10, 1999 (Chapter 991, Statutes of 1999), repeals, and amends and restates in its entirety, Division 9 of the California Uniform Commercial Code (the "Prior California Code").<sup>1</sup> Senate Bill 45, as enacted by the California Legislature (the "Revised California Code"), is the California iteration of the completely revised Uniform Commercial Code Article 9 (the "Revised Uniform Code") that was approved in 1998 by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") to amend and restate the existing Uniform Commercial Code (the "Prior Uniform Code").<sup>2</sup> Although uniform in nearly all respects, the Revised California Code does deviate in certain situations and carries forward certain non-conforming provisions contained in the Prior California Code.

This Report does not purport to analyze or comment on every provision of the Revised California Code. That ground is already well covered by two sets of published comments. First, the Official Comments to the Revised Uniform Code (the "Official Comments") explain the myriad changes to the current uniform law made by the Revised Uniform Code. Second, because there have been, and remain, differences between the uniform law and California law, the California Code Comments to the Revised California Code (the "California Comments") comment on changes to current California law wrought by the Revised California Code that are not fully addressed by the Official Comments. Accordingly, both the Official Comments and the California Comments should be consulted generally as key reference materials for an optimum understanding of the Revised California Code.

Rather than covering substantially the same ground as the Official Comments or the California Comments, this Report is intended to be read in conjunction with and as a supplement to them. More specifically, unlike the Official Comments or the California Comments, this Report focuses on identifying, summarizing and analyzing non-uniformity issues relating to the Prior California Code and/or the Revised Uniform Code and the elimination of a number of formerly non-uniform provisions.

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<sup>1</sup> Although the Revised California Code does not take effect until July 1, 2001 as provided in Chapter 7 of Senate Bill 45, for the sake of clarity in distinguishing between the Revised California Code and the existing version of Division 9 that remains in effect until July 1, 2001, throughout this Report we refer to existing Division 9 as the "Prior California Code".

<sup>2</sup> Senate Bill 2002, a clean-up bill that was introduced in the California Legislature in February 2000 and enacted in September 2000, effected a number of technical, conforming and clarifying changes to Revised Division 9. SB 2002 was modeled on clean-up and clarifying changes to the Revised Uniform Code approved by NCCUSL and ALI after those two organizations' initial approval of the Revised Uniform Code. Unless otherwise expressly indicated, all references to the Revised Uniform Code in this Report are to the Revised Uniform Code as modified by NCCUSL and ALI's clean-up amendments, and all references to the Revised California Code in this Report are to the Revised California Code as modified by SB 2002

Although there are a number of differences between the texts of the Revised California Code and the Revised Uniform Code, the vast majority of those differences reflect no more than the adaptation of the language of the Revised Uniform Code to the peculiarities of the California legislative style or to preserve existing interactions between the Prior California Code and other California statutes. Only six true non-uniformities (two of them the result of an agreement between representatives of consumer and banking interests in California that modifies the compromise at the national level reached between consumer and banking interests as reflected in the Revised Uniform Code (the "California Consumer Compromise")) are carried forward from the current California regime into the Revised California Code.<sup>3</sup> They are as follows:

- California's treatment of policies of insurance in Prior California Code Section 9104(g) (addressed in Revised California Code Section 9109(d)).
- Prior California Code Section 9307(1), which accords the same treatment to buyers of farm products in the ordinary course of business as is accorded to buyers of other types of goods in the ordinary course of business (addressed in Revised California Code Section 9320).
- California's rule, codified in Prior California Code Section 9313(4)(c), giving priority to a security interest in fixtures over the conflicting interests of owners or encumbrances of the affected real property, regardless of whether the security interest is perfected before the goods become fixtures (addressed in Revised California Code Section 9334(e)(2)).
- California's highly non-uniform mixed collateral foreclosure rules in Prior California Code Section 9501(4) (addressed in Revised California Code Section 9604).
- As a component of the California Consumer Compromise, California's decision (i) not to include the statutory damages provision contained in Revised Uniform Code Section 9-625 for a secured party's breach of Division 9 in the exercise of its remedies in a consumer transaction, and (ii) to include a statutory bar of deficiency claims for such breaches by a secured party in a consumer transaction (Prior California Code Sections 9502(2) and 9504(2); addressed in Revised California Code Section 9626(b)).
- As a component of the California Consumer Compromise, California's requirement that a secured party forego its right to a deficiency in return for the renunciation or waiver by a debtor of any of his or her rights as to consumer goods (Prior California Code Section 9508; addressed in Revised California Code Section 9629).

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<sup>3</sup> As discussed *infra*, Revised California Code Section 9614 contains a non-uniform provision addressing public sales, through retail channels, of motor vehicles constituting consumer goods and prescribing a special form of notice for such sales. This represents a new, rather than a continuing, non-uniformity.

Where no distinction is being made between the Prior California Code and the Revised California Code, or between the Prior Uniform Code and the Revised Uniform Code, this Report may refer generally to "Division 9" or to "Article 9," respectively. References to the "UCC" mean the Uniform Commercial Code generally.

## **CHAPTER 1 -- DEFINITION AND SCOPE**

Sections 9101, 9103-9107 and 9110 are all uniform, and reflect either continued uniformity between uniform and California law or new provisions of law. Sections 9102, 9108 and 9109 are discussed below.

### *A. Section 9102(A). Definitions And Index Of Definitions*

Section 9102 defines 80 terms used throughout the Revised California Code. Only one of the definitions is different from the definition of the same term contained in the Revised Uniform Code: that of "lien creditor," set forth at Section 9102(a)(52). Other definitions--that of "certificate of title" (at Section 9102(a)(10)), "bank" (at Section 9102(a)(8)), "deposit account" (at Section 9102(a)(29)), and "new value" (at Section 9102(a)(57)) -- are uniform in the Revised California Code, but reflect the elimination of existing differences between California law and the Prior Uniform Code in ways that change current California law or that, absent comment, might erroneously be interpreted as changing current California law. The definition of "agricultural lien," at Section 9102(a)(5), is discussed because of the magnitude of the change in existing law represented by subjecting agricultural liens to certain aspects of Division 9.

#### *1. Non-uniform Provision.*

a. Lien Creditor (Section 9102(a)(52)). Revised Uniform Code Section 9-102(a)(52)(A) and Revised California Code Section 9102(a)(52)(A) both define "lien creditor" generally to include creditors who have acquired liens "by attachment, levy or the like". The California version adds a sentence (derived from Prior California Code Section 9301) providing that creditors who acquire attachment or judgment liens on personal property only by means of a filing with the California Secretary of State do not constitute "lien creditors." This clarification preserves an existing difference between California law and the Prior Uniform Code; it reflects provisions in the California Code of Civil Procedure ("CCP") that provide that persons who obtain attachment liens by filing with the California Secretary of State in accordance with CCP Section 488.375 or Section 488.405, or judgment liens by filing with the California Secretary of State in accordance with CCP Section 697.510, are subject to the priority rules contained in CCP Section 488.500 or CCP Section 697.590, as the case may be. Such creditors therefore should not be treated as a "lien creditors" subject to the general priority rules of the rest of the Revised California Code.

#### *2. Uniform Provisions.*

a. Agricultural Lien (Section 9102(a)(5)). Revised California Code Section 9102(a)(5) defines a term new to the UCC: "agricultural lien." The definition is uniform; the term is limited to a nonconsensual interest in farm products that (i) secures an obligation for the payment or performance of an obligation arising from the furnishing of goods or services to a farming operation or

for rent on real property used in farming operations, (ii) is created by statute in favor of a person providing such goods or services to the debtor in the ordinary course of its business, or leased real property to the debtor in connection with its farming operations, and (iii) is effective whether or not the person claiming its benefit is in possession of the property subject to the lien. These liens include:

- Agricultural Laborer's Lien (Civil Code Sections 3061.5-3061.6).
- Lien for Services of Stallion, Jack or Bull (Civil Code Sections 3062-3064).
- Dairy Cattle Supply Lien (Food & Agriculture Code Sections 57401-57414).
- Poultry and Fish Supply Lien (Food & Agriculture Code Sections 57501-57545).
- Agricultural Chemical and Seed Lien (Food & Agriculture Code Sections 57551-5795, 57700).

The inclusion of agricultural liens within Division 9 will, in most cases, have little practical effect, in as much as the Food & Agriculture Code liens described above have previously been made subject to Division 9 in most respects and must be filed with the California Secretary of State.

b. Bank (Section 9102(a)(8)). Revised California Code Section 9102(a)(8) defines the term "bank." There has been no corresponding definition in either the Prior California Code or the Prior Uniform Code for purposes of Division 9 and Article 9, respectively; however, the Prior Uniform Code, at Section 9105(1)(e), has defined "deposit account" with reference to any "bank, savings and loan association, credit union or like organization." The new definition, which is identical to the definition of "bank" contained in Section 4-105 of the UCC, focuses on whether an organization is "engaged in the business of banking," and expressly includes "savings banks, savings and loan associations, credit unions, and trust companies," is not expected to lead to different conclusions regarding whether a particular account is a "deposit account" than does Prior California Code Section 9105(1)(e).

c. Certificate of Title (Section 9102(a)(10)). The Prior Uniform Code does not define "certificate of title." Prior California Code Section 9103(2)(a) added to the uniform version of that section (which dealt with goods covered by a certificate of title) language making that section applicable to goods subject to a certificate of title requiring that security interests be perfected by notation on the certificate, regardless of whether the certificate was called a "certificate of title."

Revised Uniform Code Section 9-102(a)(10) defines a certificate of title as:

"a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate . . ."

The adoption by California, in paragraph (10) of subdivision (a) of Section 9102, of the uniform definition of "certificate of title" in the Revised California Code is not intended to result in a different conclusion being reached as to whether a given certificate constitutes a "certificate of title" than would have been reached under the Prior California Code, but is intended to preserve uniformity with the Revised Uniform Code in a circumstance where the difference would not be material.

d. Deposit Account (Section 9102(a)(29)). Section 9102(a)(29) defines a "deposit account" as a demand, time, savings, passbook or similar account maintained with a bank, but expressly

excludes, among other things, accounts evidenced by "instruments," as that term is defined in the Revised California Code. The Prior California Code definition of "deposit account," at Section 9105(e), is similar to the revised definition, but does not exclude instruments per se; instead, it excludes accounts that are evidenced by "negotiable certificate[s] of deposit." Because accounts represented by negotiable certificates of deposits are excluded from the "deposit account" definition under the Prior California Code, one might conclude, based on the negative inference, that all CD accounts represented by non-negotiable certificates of deposit, as well as uncertificated CD accounts and CD accounts evidenced by writings not labeled "certificates of deposit," may be considered "deposit accounts" under current California law. The Revised California Code may change current California law, in that the Revised California Code defines CD accounts as "deposit accounts" only if they are not evidenced by "instruments." Under Revised California Code Section 9102(a)(47), an "instrument" is defined as a negotiable instrument or any other writing (with certain exceptions irrelevant to this discussion) that evidences a right to the payment of a monetary obligation that is of a type that in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment. This is essentially identical to the current definition of that term, contained in Prior California Code Section 9105(i).

Thus, in all cases, the Revised California Code requires an analysis of whether the account is evidenced by an instrument. If the account is not certificated or otherwise evidenced by a writing evidencing the bank's obligation to pay, or if the account is evidenced by a writing that does not constitute an instrument, the account will be considered a "deposit account" because it is not evidenced by an instrument. If, on the other hand, the bank issues an instrument evidencing its monetary obligation, then the account is a "deposit account."

This change to the definition of "deposit account" is an improvement over existing California law, because under the new definition CD accounts will be categorized as "deposit accounts" based not on the labeling of the writing evidencing the account, but on the functional attributes of the writing.

e. New Value (Section 9102(a)(57)). Revised Uniform Code Section 9-102(a)(57) defines "new value" as follows:

"(i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation."

As is the case with paragraph (10) of subdivision (a) of Section 9102 (defining "certificate of title"), paragraph (57) of subdivision (a) is an instance in which the Prior Uniform Code did not specifically address an issue that was addressed by the Prior California Code. In this case, Section 9105(1)(o) of the Prior California Code defined "new value" in a manner similar to that of paragraph (57), except that it expressly provided that "new value" did not include "extension or renewals of existing obligations of the debtor." As with California's adoption of the uniform version of the definition of "certificate of title", it appears that the adoption of the uniform version of the definition of "new value" is not intended to work a substantive change in the law.

## B. *Section 9108. Sufficiency Of Description*

Section 9108 provides the minimum standards for descriptions of collateral in security agreements.

### 1. *General.*

Prior Uniform Code Section 9-110 provides that "any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." Prior California Code Section 9110 added to this: "Personal property may be referred to by general kind or class if the property can be reasonably identified as falling within such kind or class or if it can be so identified when it is acquired by the debtor."

Revised Uniform Code Section 9-108(a) carries forward the substance of Prior Uniform Code Section 9-110. Revised Uniform Code Section 9-108(b) provides that, with certain exceptions, a description of collateral "reasonably identifies the collateral if it identifies the collateral by (1) specific listing; (2) category; (3) except as otherwise provided in subdivision (e) dealing with commercial tort claims and, in consumer transactions, consumer goods, a security entitlement, a securities account, or a commodity account, a type of collateral defined in the UCC; (4) quantity; (5) computational or allocational formula or procedure; or (6) except for a description such as "all debtor's assets", any other method, if the identity of the collateral is objectively determinable." The Revised California Code incorporates the uniform version of Section 9-108(a) and (b). The last sentence of Prior California Code Section 9110 provided a clarification of the Prior Uniform Code that, in light of the safe-harbor provisions of Revised California Code Section 9108(b), is no longer necessary.

### 2. *Non-uniform Provision.*

a. Section 9108(f). This provision, which states that the description of investment property collateral and consumer goods in consumer credit transactions under Title 1.85 (commencing with Section 1799.90) of Part 4 of Division 3 of the Civil Code must comply with the relevant provisions of that title, is not a true non-uniformity. Rather, it is consistent with Revised Uniform Code Section 9-201(b), which contemplates that the consumer protection laws of each state will apply, where appropriate, to transactions that are subject to Article 9. Accordingly, Title 1.85, which requires that more precise descriptions of investment property and consumer goods be included in security documentation for consumer credit transactions than would otherwise be required under the preceding subdivisions of Section 9108, establishes a special rule for consumers that, under Revised California Code Section 9201(b), would control even absent the express reference thereto inserted into the Revised California Code. Section 9108(f) is a reminder that is included in the Revised California Code as the result of an agreement between California consumer and banking representatives.

## C. *Section 9109. Scope*

Section 9109 specifies the transactions and circumstances to which Division 9 will and will not apply.

### 1. *Landlord's Liens.*

The predecessor provision to Section 9109 of the Revised California Code, Prior California Code Section 9104, excluded the reference to "landlord's liens" found in Prior Uniform Code

Section 9-104(b) as among the interests to which Article 9 does not apply. The exclusion existed because California law generally does not recognize the existence of a "landlord's lien." Section 9109 of the Revised California Code includes the Revised Uniform Code's reference to "landlord's liens" as interests to which Division 9 does not apply. This inclusion in Section 9109 of the exclusionary reference to landlord's liens is not intended to imply that any such liens exist under California law or as a change to current California law, but was inserted solely for the purpose of maintaining uniformity with the Revised Uniform Code.

## *2. Governmental debtors.*

Prior California Code Section 9104(e) excludes from the scope of Division 9 a "transfer, *including creation of a security interest*, by a government or governmental subdivision or agency" (emphasis added). Revised California Code Sections 9109(c)(2) and (3) replace Prior California Code Section 9104(e) and provide that Division 9 applies to security interests created by a State or foreign country, or a "governmental unit" (defined in Section 9102) of either, except to the extent that another statute governs the creation, perfection, priority or enforcement of such a security interest. Under Section 9109(c)(2), Division 9 defers to all such other California statutes. Section 9109(c)(2) is non-uniform in that it adds a sentence elaborating on the types of statutes to which Division 9 defers. The addition is merely illustrative, not substantive, and does not create any non-uniformity to the Revised Uniform Code. Section 9109(c)(3) defers to statutes of another State or a foreign country only to the extent that those statutes contain rules applicable specifically to the creation, perfection, priority or enforcement of security interests created by the governmental unit in question.

## *3. Insurance policies.*

Revised Uniform Code Section 9-109(d)(8) carries forward the Prior Uniform Code exclusion from coverage of security interests in insurance policies, except for receivables under health insurance policies. The Reporter's Notes to the draft of the Revised Uniform Code prepared for the July 24-31, 1998 meeting of NCCUSL indicate that the drafters believe that other law adequately addresses the creation of security interests in insurance policies. California has permitted the creation and perfection of security interests in insurance policies under the Prior California Code for some 30 years now and the Revised California Code continues the California practice of permitting the creation and perfection of such security interests under Division 9. Given that the effect of the Revised Uniform Code is to let the laws of individual states govern the issue, it should not disturb the structure of the uniform statute that California has elected to retain its non-uniform provision as the applicable governing law. This variation, therefore, is not incompatible with commercial law uniformity.

## *4. Real estate.*

Revised California Code Section 9109(d)(11) provides that, except as otherwise provided with respect to fixtures, Division 9 does not apply to the creation or transfer of any interest in or lien on real estate, "including a lease or rents thereunder." Prior California Code Section 9104(j) added: "and to any interest of a lessor and lessee in any such lease or rents." The Prior California Code variation from the Prior Uniform Code is only a matter of clarification. The interest of a lessor or a



lessee in a lease or rents is an interest in the lease or rents, and no change in existing California law is intended by the deletion of the clarifying reference in the interest of uniformity.

5. *Deposit accounts.*

Unlike the Prior Uniform Code, the Prior California Code has long permitted deposit accounts to be taken as original collateral and has included security interests in deposit accounts within the scope of Division 9. The Revised Uniform Code now also permits deposit accounts to be taken as original collateral under Article 9, but with a limitation: Section 9-109(d)(13) excludes the assignment of a deposit account in a consumer transaction from the scope of Article 9. The exclusion is the result of complex negotiations and discussions among consumer representatives, lending and commercial finance representatives and academics at the national level, and the Revised California Code incorporates the uniform exclusion. *Practitioners should note that, as discussed below with respect to Chapter 3 of the Revised California Code, California has also adopted the uniform rules applicable to the perfection of security interests in deposit accounts. The new rules differ significantly from the rules applicable under the Prior California Code.*

6. *Certain inventory of a retail merchant.*

Prior California Code includes Sections 9102(a)(4)-(9) (not part of Prior Uniform Code), which imposed certain restrictions on a lender's ability to take a security interest in the inventory of a retail merchant. Project: California Chattel Security and Article Nine of the Uniform Commercial Code, 8 UCLA L. REV. 806, 817 (1961) (the "Project Report") at p. 829, indicates that these provisions were added to carry forward the effect of the inventory lien statutes in effect at the time Division 9 was first adopted in California, and were intended to prevent a retailer from encumbering all of its inventory assets in favor of a secured lender, to the detriment of its unsecured creditors. California Code Comment 6 to Prior California Code Section 9102 confirms this conclusion.

The original provisions were amended in 1985 to reduce greatly the scope of the restriction and, even in the narrow circumstances where the restriction was left in place, it permitted a lender to take a security interest provided that the loan documents placed no restrictions on the borrower's use of the loan proceeds other than those that are "commercially reasonable and in good faith." There has been no apparent ill effect on retail merchants or their unsecured creditors as a result of the virtual elimination of the restriction in 1985, and the existing non-uniform provision has been little more than a complicated trap for the unwary. The Revised California Code contains no provision comparable to Prior California Code Section 9102(a)(4) - (9).

7. *Certain public contracts.*

Prior California Code Section 9104(l) is a non-uniform exclusion relating to public construction contracts under the Improvement Act of 1911. This exclusion is retained, in Revised California Code Section 9109(d)(14), to preserve the status quo in light of the peculiarly California nature of the subject.

8. *"Transition property" as defined in the PUC.*

Prior California Code Section 9104(m) adds to the list of excluded transactions a provision excluding "transition property", as defined in Section 840 of the California Public Utilities

Code ("PUC"), except to the extent that the provisions of Division 9 are referenced in Article 5.5 (commencing with Section 840) of Chapter 4 of Part 1 of Division 1 of the PUC. In recognition of the detailed provisions of PUC Section 843, the Revised California Code, at Section 9109(d)(15), continues this exclusion from the scope of Division 9.

#### 9. *Tort claims.*

Security interests in tort claims were excluded from the scope of both the Prior Uniform Code and the Prior California Code. The Revised California Code, like the Revised Uniform Code, now applies to security interests in *commercial* tort claims, which constitute a separate category of collateral that is expressly excluded from the definition of "general intangible." See Section 9102(a)(42) (defining "general intangible"), Section 9108(e) and Section 9204(b). Because of the nature of commercial tort claims, however, the treatment accorded to them under the Revised California Code, and under the Revised Uniform Code, differs from that accorded to other categories of collateral. Section 9108(e)(2) provides that a description of a commercial tort claim by type is not a sufficient description of that collateral, and Section 9204(b)(2) provides that after-acquired property clauses in security agreements will not attach to commercial tort claims. Moreover, inasmuch as a tortfeasor is not an "account debtor," the rules governing waiver of defenses and discharge of an obligation by an obligor (Sections 9403, 9404, 9405 and 9406) are inapplicable to commercial tort-claims.

Revised California Code Section 9109(d)(12) provides that Division 9 does not apply to tort claims other than commercial tort claims and tort claims constituting proceeds of existing collateral. It should still be possible, however, to create a contractual lien on the excluded claims pursuant to California Civil Code Section 2881. See, e.g., *Bluxome Street Associates v. Woods*, 206 Cal. App. 3d 1149, 1153 (1988). One way that might be accomplished is by means of a security agreement that grants a security interest in "general intangibles," as only commercial tort claims are expressly excluded from the definition of general intangibles, and the security agreement would constitute the contract pursuant to which the lien was created for purposes of Civil Code Section 2881. The new, stricter rules regarding descriptions of collateral that apply under the Revised California Code by their terms would not apply to the creation, under the Civil Code, of a lien on a tort claim that is not subject to Division 9.

## CHAPTER 2 -- CREATION AND ATTACHMENT OF SECURITY INTERESTS

Sections 9202-9210 are all uniform, and reflect either continued uniformity between uniform and California law or new provisions of law. Section 9201, discussed below, reflects a non-uniformity built into the Revised Uniform Code to accommodate each state's protective statutes. Additionally, the Revised California Code reflects the deletion of an existing non-uniformity regarding debtors' requests for information regarding their obligations and the security for those obligations.

### A. *Section 9201. Effectiveness Of Security Agreement*

Section 9201 provides (1) in subdivision (a), that a security agreement, with certain exceptions, is generally effective between the debtor and secured party and is likewise effective against third parties, and (2) in subdivision (b), that transactions subject to the Revised California Code are also subject to "any applicable rule of law which establishes a different rule for consumers" and to several other specific statutes, primarily addressing consumers' and lenders' rights and obligations. Subdivisions (c) and (d)

clarify the application of subdivision (b), providing that the laws specified in subdivision (b) are to control in cases of conflict with the Revised California Code, but that the Revised California Code is not intended to extend the scope of those laws to transactions to which they would not otherwise apply.

Subdivision (b), derived from Prior California Code Section 9203(4), not only updates the list of other statutes to which the Revised California Code is subject (e.g., by reflecting the merger of the former Consumer Finance Lenders Law, Personal Property Brokers Law and Commercial Finance Lenders Law), but also provides that the Revised California Code is subject to "any applicable rule of law which establishes a different rule for consumers." Prior California Code Section 9203(4), from which subdivision (b) is derived, has no comparable provision, but is limited to a specific list of statutes to which the Prior California Code is subject. The inclusion in subdivision (b) of a general reference to other law affecting the rights of consumers protects against an inadvertent failure to include, in the specific listing, all statutes providing special protections to consumers, and reflects the fact that the Revised California Code is intended primarily to serve as a commercial code.

*B. Section 9210. Request For Accounting; Request Regarding List Of Collateral Or Statement Of Account*

Prior Uniform Code Sections 9-208(1), (2) and (3) entitle a debtor to send to the secured party a statement seeking verification of the outstanding balance of unpaid indebtedness and of a list of collateral, and require the secured party to comply within two weeks after its receipt of such a request. Prior California Code Section 9208(4) (having no analog in the Prior Uniform Code) designates where the debtor's request must be sent if the secured party is an organization maintaining branches or branch offices.

Revised California Code Section 9210 sets forth more detailed provisions than does current law regarding a debtor's right to have certain information regarding a secured obligation and the collateral securing it, including a requirement that the request reasonably identify the transaction regarding which it is submitted. It includes no provision similar to Prior California Code Section 9208(4), however. According to the California Code Comment to Prior California Code Section 9208, subdivision (4) was added "to meet the branch banking practice prevalent in California" at the time--when records were less centralized, and less computerized than they are now, and a request directed to a branch office not involved in a transaction might have made it difficult for a secured party to reply within the mandated 14-day response period. Given today's computerized record-keeping, such a provision was no longer necessary. Because California lenders lend outside of California and California borrowers borrow from out-of-state lenders, uniformity on this point was particularly critical to avoid creating conflicting burdens on lenders.

### **CHAPTER 3 -- PERFECTION AND PRIORITY OF SECURITY INTERESTS**

Sections 9301-9303, 9305-9308, 9316, 9318, 9319, 9321-9326, 9328-9333 and 9335-9342 are all uniform, and reflect either continued uniformity between uniform and California law or new provisions of law. Section 9304, discussed below, provides a new, uniform choice of law rule with respect to the law governing perfection, the effect of perfection or nonperfection, and priority of security interests in deposit accounts. Section 9309 reflects a change in California law relating to perfection with respect to sales of accounts that conforms California law to what has been the law under the Prior

Uniform Code and will be the law under the Revised Uniform Code. Sections 9310 and 9311 include special provisions relating to the perfection of security interests in insurance policies and in approved air contamination emission reductions, and Section 9311 will also, it is expected, eliminate an existing non-uniformity with respect to the perfection of security interests in motor vehicles constituting inventory held for lease by a person not engaged in the business of selling motor vehicles. Sections 9312 and 9314 involve a change in California law with respect to the perfection of security interests in deposit accounts that conforms the Revised California Code to the Revised Uniform Code. (Until now, security interests in deposit accounts have not been subject to the UCC except in California and four other states.) Sections 9313 and 9315 incorporate provisions, specific to California, that take into account provisions of the CCP that are relevant to the perfection of collateral in the possession of a levying officer. Section 9320 reflects California's retention of a non-uniform rule regarding the rights of buyers of farm products and its relinquishment of a non-uniform rule regarding the rights of buyers of consumer goods in casual sales. Sections 9327 and 9334 relate primarily to the priority of security interests in deposit accounts, fixtures, and crops.

*A. Section 9304. Law Governing Perfection And Priority Of Security Interests In Deposit Accounts*

While security interests in deposit accounts as original collateral have been subject to the Prior California Code for many years, that has not been the case for 45 of the states, and the territorial application of California's rule has been uncertain at best. It has never been clear, for example, whether the California rule applied to all deposit accounts held by California debtors, wherever the depository banks were located, or whether the California rule applied only to deposit accounts maintained with banks located within California (and, if so, whether it applied to deposit accounts that were maintained with banks located within California but owned by debtors located outside of California). The Revised Uniform Code now applies to security interests in deposit accounts as original collateral, and Section 9-304(b) provides a uniform rule for determining the law that governs perfection, the effect of perfection or nonperfection, and the priority of security interests in deposit accounts: the local law of the depository bank's jurisdiction will govern. As with the rules for determining the jurisdiction of a securities intermediary for purposes of perfecting security interests in securities accounts (Prior California Code Section 8110), the rule provides a hierarchy of determinants: (1) the jurisdiction specified in the deposit agreement as the bank's jurisdiction for purposes of the UCC, (2) the governing law specified in the deposit agreement, (3) the jurisdiction in which the office of the bank specified in the deposit agreement as the office at which the deposit account is to be maintained is located, (4) the location of the office of the bank specified in the debtor's account statements as the office from which the account is serviced, and (5) the jurisdiction in which the bank's chief executive office is located. Revised California Code Section 9304(b) adopts the uniform rule.

*B. Section 9309. Security Interest Perfected Upon Attachment*

Section 9309 identifies those classes of security interests that are automatically perfected upon attachment, without the need for further action. Among them, at subdivision (2), is an assignment of accounts or payment intangibles that does not (by itself or in conjunction with other assignments to the same transferee) transfer a significant part of the assignor's outstanding accounts or payment intangibles, thus continuing the rule under the Prior Uniform Code. The rule in California had been different: Prior

California Code did not include the corollary provision of the Prior Uniform Code (Section 9-302(1)(e)), with the effect that filing has been required with respect to any assignment of accounts. When the Prior California Code was first adopted, the phrase "significant part" was thought to be too ambiguous. *See, e.g.*, The Sixth Progress Report to the Legislature by the Senate Fact Finding Committee on Judiciary (1959-61), Part 1: The Uniform Commercial Code, at Chapter VI ("Recommendations and Comments of the California Bankers Association"), p. 421: "Apart from the absence of a test for determining what is a significant part, we think the provision is unrealistic and impractical and should be deleted." The Revised California Code adopts the uniform approach, thereby rejecting the prior California approach.

*C. Section 9310. When Filing Required To Perfect Security Interest Or Agricultural Lien; Security Interests And Agricultural Liens To Which Filing Provisions Do Not Apply*

Subject to specified exceptions, subdivision (a) of Section 9310 establishes the central Division 9 principle that filing a financing statement is necessary for the perfection of security interests and agricultural liens. Subdivision (b) lists security interests and agricultural liens that are exceptions to the foregoing general rule, and includes, in paragraph (11), an exclusion for security interests in insurance policies (other than health care insurance receivables). This non-uniformity was necessary in light of California's nonstandard inclusion of security interests in insurance policies within the scope of Division 9.

*D. Section 9311. Perfection Of Security Interests In Property Subject To Certain Statutes, Regulations And Treaties*

Subdivision (a) of Section 9311 exempts from the filing provisions those transactions as to which a system of filing—state or federal—has been established under other law. Subdivision (b) makes clear that when such a system exists, perfection of a covered security interest can be achieved only through compliance with that system (*i.e.*, filing under Division 9 is not a permissible alternative).

*1. Vehicles Constituting Inventory.*

Prior California Code Section 9302(3)(b) was a non-uniform provision dealing with the inventory exception to the general rule that no financing statement need be filed to perfect security interests in vehicles, boats and the like that are subject to state registration or certificate of title requirements. It required filing whenever such goods were deemed inventory, regardless of whether they were held for sale or lease, or by whom they were held. Accordingly, Prior California Code Section 9302(3)(d) omitted the additional, uniform provision that the filing requirement applies only to those security interests created by the person holding such goods for sale.

Section 9311(d) of the Revised California Code, as enacted in 1999 by the California Legislature, provided that a security interest in inventory otherwise subject to federal registration or state certificate of title requirements must be perfected by filing when "held for sale or lease by a person or leased by that person as lessor, if that person is in the business of selling or leasing goods of that kind, and if the security interest was created by that person as debtor." This tracked the original version of the Revised Uniform Code, which had expanded the inventory filing requirement found under the Prior Uniform Code to include filings with respect to vehicles, etc., held for sale or lease. By encompassing leased goods, the original uniform provision had conformed to the most important aspects of the original

California non-uniformity, and, in the interest of uniformity, the Revised California Code included the original uniform version of Section 9-311(d).

Among the changes effected by NCCUSL and ALI's post-1998 amendments to the Revised Uniform Code and the California Legislature's enactment of SB 2002 in September 2000<sup>4</sup> is a modification to Section 9-311 that applies the filing requirement of that section only to security interests in motor vehicles that are "inventory held for sale or lease by a person or leased by that person as lessor *and that person is in the business of selling [instead of 'selling or leasing'] goods of that kind.*" (Emphasis added.) The effect of the change is to require that security interests taken in the inventory of debtors (for example, truck rental companies) engaged in the business of leasing motor vehicles, as opposed to the business of selling AND leasing motor vehicles, be perfected by notation on the vehicles' certificates of title. That is both the requirement and the practice under the Prior Uniform Code. This modified version of Section 9311 of the Revised California Code even more radically changes the existing rule in California under the Prior California Code, albeit the change is not anticipated to be disruptive to the businesses of those secured parties that will be most affected.

## 2. *Air Contaminant Emission Reductions.*

The registration of interests in air contaminant emission reduction is similar, in some respects, to the registration of certificated vehicles and boats, which is exempt from filing requirements under both the Prior Uniform Code and the Revised Uniform Code. Accordingly, California has retained its non-uniform provision regarding the perfection of security interests in air contaminant emission reductions in the same form as set forth in Prior California Code Section 9311(a)(2)(C).

## E. *Section 9312. Perfection Of Security Interests In Chattel Paper, Deposit Accounts, Documents, Goods Covered By Documents, Instruments, Investment Property, Letter Of Credit Rights, And Money; Perfection By Permissive Filing; Temporary Perfection Without Filing Or Transfer Of Possession*

### 1. *Deposit Accounts.*

Subdivision (b) of Section 9312 provides, at paragraph (1), that a security interest in deposit accounts may be perfected only by obtaining control over it. This perfection mechanism differs markedly from the rule under Prior California Code Section 9302(g), which provides for perfection of security interests in deposit accounts by notice to the depository (or, if the depository is also the secured party, upon execution of the security agreement).

The Article 9 Drafting Committee selected the method of control as the sole method of perfection and rejected, after consideration and debate, notice and filing as alternative, subordinate methods of perfection. While California's experience under the current perfection regime appears to have been noncontroversial, there are several reasons why retention of such a non-uniform approach in this area would be problematic. First, an additional method of perfection by notice or filing would create choice of law issues (and create unexpected results) under Revised California Code Sections 9301 and 9304 if the depository bank's jurisdiction were California and the debtor were located outside of California. Because the perfection and priority of security interests in deposit

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<sup>4</sup> See note 2, supra.

accounts are governed by the law of the depository bank's jurisdiction, the location of the debtor, which governs the place of filing with respect to virtually all security interests perfected by filing, would be irrelevant to whether a California non-uniform provision allowing perfection by notice or filing would apply. Second, additional perfection methods would continue in place issues never answered under the Prior California Code with respect to the rights and obligations of the secured party, the debtor and the depository bank when the secured party enforces its rights to the deposit account. Addressing such issues would have required further substantial deviations from the text of the Revised Uniform Code, resulting in continued non-uniformity. Moreover, it has long been the practice in California for secured parties that place material weight upon the value of deposit accounts as collateral to enter into lock-box or other arrangements according them rights with respect to such accounts that would amount to "control" under Revised California Code Section 9104, and there is every reason to believe that depository banks will establish reasonable and customary practices for entering into control agreements with debtors and secured parties under the Revised California Code, making it possible to perfect a security interest in a deposit account that is an important element of a transaction. For these reasons, California elected to eliminate its non-uniform rule for perfecting security interests in deposit accounts and to rely exclusively on the uniform provision that has been incorporated into the Revised California Code.

## *2. Instruments Claimed as Proceeds.*

Prior California Code Section 9304(7) contains a non-uniform provision that addresses the specific instance in which an instrument, claimed as proceeds of other collateral, is in the custody of a levying officer, so as to prevent the secured party from taking possession of the instrument to maintain a perfected security interest. Since Revised California Code Section 9312 permits a security interest in an instrument to be perfected by filing, the need for California's custom procedure has been eliminated.

## *3. Insurance Policies.*

Revised California Code Section 9312(b)(4) is a non-uniform provision retaining the current California rule for the perfection of security interests in insurance policies, other than health care insurance receivables, which are governed by other "uniform" sections of the Revised California Code.

### *F. Section 9313: When Possession By Or Delivery To Secured Party Perfects Security Interest Without Filing*

Section 9313 sets forth the rules regarding perfection by possession. As noted above, the non-uniform provision found at Prior California Code Section 9304(7), relating to instruments in the custody of a levying officer, was no longer necessary.

### *G. Section 9314: Perfection By Control*

Section 9314 provides for perfection by control with respect to investment property, deposit accounts, letter-of-credit rights and electronic chattel paper. Explanations of how a secured party takes control of these types of collateral are found in Sections 9104 through 9107. As noted above, the new rule eliminates the current California non-uniformity relating to the perfection of security interests in deposit accounts.

#### H. *Section 9315. Secured Party's Rights On Disposition Of Collateral And In Proceeds*

Section 9315 deals generally with the effect of a disposition of collateral upon the secured party's security interest in that collateral and the proceeds of the disposition. The California version includes, in addition to the uniform provisions of this section, subdivision (f), which provides that cash proceeds retain their character as such while in the possession of a levying officer pursuant to the provisions of the CCP. This provision continues intact the substance of Prior California Code Section 9306(6), and accommodates the specified provisions of the CCP.

#### I. *Section 9317. Subordination of Security Interest Or Agricultural Lien; Persons Who Take Free of Interest or Lien*

Section 9317 lists the classes of persons who take priority over, or take free of, a security interest or agricultural lien. Subdivision (a) provides that security interests and agricultural liens are subordinate to the rights of (1) persons entitled to priority under Section 9322 (dealing generally with the relative priorities of competing security interests and agricultural liens), and (2) a person who becomes a lien creditor before the earlier of the time that the security interest or agricultural lien is perfected, or one of the conditions specified in Section 9203(b)(3) is met and a financing statement covering the collateral is filed (thus protecting a secured party's priority with respect to after-acquired collateral). Accordingly, in order for certain security interests to be protected against a lien creditor, the second prong of Section 9317(a)(2) requires not only the prior filing of a financing statement covering the collateral, but also the prior satisfaction of one of the conditions described in Section 9-203(b)(3) (i.e., that (i) the debtor has authenticated a security agreement that contains a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned, (ii) the collateral, if not a certificated security, is in the possession of the secured party under Section 9313 pursuant to the debtor's security agreement, (iii) if the collateral is a certificated security in registered form, the security certificate has been delivered to the secured party under Section 8301 pursuant to the debtor's security agreement, or (iv) the collateral, if deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, is under the secured party's control, as defined in Section 9104, 9105, 9106 or 9107, pursuant to the debtor's security agreement).

*Again, practitioners should bear in mind that the claims of persons who obtain attachment liens by filing with the California Secretary of State in accordance with CCP Section 488.375 or Section 488.405, or judgment liens by filing with the California Secretary of State in accordance with CCP Section 697.510, are subject to the priority rules contained in CCP Section 488.500 or CCP Section 697.590, respectively, rather than to the rules of Section 9317.*

#### J. *Section 9320. Buyers Of Goods*

Section 9320 deals with the rights of buyers of collateral.

##### 1. *Continuing Non-uniformity.*

Subdivision (a) continues an existing California non-uniformity: Revised Uniform Code Section 9-320, like Prior Uniform Code Section 9-307(1), accords less protection to buyers of farm products from persons engaged in farming operations than is accorded to other buyers in ordinary



course of business. Revised California Code Section 9320, like Prior California Code Section 9307(1), omits that distinction, permitting buyers of farm products in the ordinary course of business to take free of security interests created by their sellers. California's retention of its non-uniform rule should present no insuperable issues of conflict-of-laws, because Revised California Code Section 9302 and Revised Uniform Code Section 9-302 both provide that, while farm products are located in the state of California, the local law of California governs, among other things, perfection and the effect of perfection or nonperfection of a security interest in those farm products.

## *2. New Conformity.*

Subdivisions (b) and (c) of Section 9320 alter current California law. Prior California Code Section 9307 omits Prior Uniform Code Section 9-307(2) (the source for subdivisions (b) and (c) of Revised Uniform Code Section 9-320). Subdivision (2) of Prior Uniform Code Section 9-307 provides that buyers of goods from persons who used or bought the goods primarily for personal, family or household purposes (so-called "garage sale buyers") take free of even a perfected security interest, unless, among other things, a financing statement has been filed covering the goods. Revised Uniform Code Section 9-320 carries forward that rule and has been incorporated into the Revised California Code.

Subdivision (2) of Prior Uniform Code Section 9-307 was not included in the Prior California Code because it would have forced secured parties to file in order to protect their interests in consumer goods against buyers, even though filing is not required for perfection in consumer goods. A filing requirement, it was feared, would result in a flood of largely-useless paperwork, since most consumers do not resell their encumbered goods and most consumer purchasers from consumers would not check for prior filings in any event. Experience in other states, however, has shown that the feared flood of paper was in fact a trickle; and thus, there was no compelling reason to perpetuate California's non-uniform rule.

## *K. Section 9327. Priority Of Security Interests In Deposit Accounts*

Section 9327 addresses the priority of conflicting security interests in deposit accounts. The provision is uniform, but has the effect of changing current California law regarding the priority of such security interests. Paragraph (1) provides that a security interest in a deposit account perfected by control takes priority over conflicting security interests not so perfected. Paragraph (2) provides that if the bank with which the account is maintained has entered into multiple control agreements, the security interests rank according to the time of obtaining control. Paragraph (3) provides that a security interest in favor of the bank with which the deposit account is maintained takes priority, with one exception, over all conflicting security interests in the deposit account; paragraph (4) provides that if a secured party takes control of the deposit account by becoming the bank's customer, it has priority over the bank's security interest.

## *L. Section 9334. Priority Of Security Interests In Fixtures And Crops*

### *1. Fixtures.*

Subdivision (a) of Section 9334 provides that a security interest under Division 9 may be created in goods that are fixtures or may continue in goods that become fixtures, but not as to ordinary building materials incorporated into an improvement on land. Subdivision (b) provides that

Division 9 does not prevent the creation of an encumbrance upon fixtures under real property law. Subdivision (c) provides that, in cases not otherwise covered by subdivisions (d) through (h), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property which is not the debtor.

Subdivision (d) relates to the relative priorities of a purchase money secured party and an encumbrancer or owner, and is uniform. Subdivision (e), relating to relative priorities outside of the purchase money arena, is a non-uniform provision that continues the rule of Prior California Code Section 9313(4)(c), according priority to the secured party if the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances that are consumer goods. Revised Uniform Code Section 9-334(e) requires, for the secured party to have similar priority, that the debtor have an interest of record or be in possession of the real property and that the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record and the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner. The uniform version of subdivision (e) eliminates the priority for the encumbrancer or owner if (1) the debtor has an interest of record in, or is in possession of, the real property, (2) the fixtures are readily removable factory or office machines, equipment that is not primarily used or leased for use in the operation of real property, or replacements of domestic appliances that are consumer goods and, (3) *before the goods become fixtures*, the security interest is perfected by any method permitted by Article 9. The non-uniform California version reflects generally the priorities accorded to the relative interests of tenants and landlords under California Civil Code Section 1019, which permits a tenant to remove readily removable trade fixtures.

## *2. Crops.*

Subdivision (i) of Section 9334 provides that a perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property. This provision is new to the UCC; it reflects the conclusion that should have been drawn by courts up until now from the fact that crops have always been classified as "goods" subject to the provisions of the UCC.

## **CHAPTER 4 -- RIGHTS OF PARTIES IN TRANSACTIONS WHERE SECURITY INTEREST HAS BEEN GRANTED**

Sections 9402-9405 and 9407-9409 are uniform, and reflect either continued uniformity between uniform and California law or new provisions of law; Sections 9401 and 9406, discussed below, while also uniform, eliminate existing differences between the Prior California Code and the Prior Uniform Code.

### *A. Section 9401. Alienability Of Debtor's Rights*

Subdivision (a) provides that, with certain exceptions, whether a debtor's rights in collateral may be transferred is governed by law other than Division 9. Subdivision (b) provides that an agreement between a debtor and secured party that prohibits transfer or makes transfer a default will not prevent a transfer by the debtor from taking effect.

Revised Uniform Code Section 9-401 is derived from Prior Uniform Code Section 9-311, which permitted a debtor's rights in collateral to be transferred "notwithstanding a provision in the

security agreement prohibiting any transfer or making the transfer constitute a default." Prior California Code Section 9311 added a clause to make clear that "a provision in the security agreement making the transfer constitute a default is valid," notwithstanding the debtor's ability to transfer the collateral as a matter of law.

Revised California Code Section 9401(b), which is now uniform, addresses the same issue differently. Whereas Prior California Code Section 9311 and its prior uniform analog focused on the legal effectiveness of a transfer of collateral despite prohibitory language in the security agreement, the new statute focuses on the legal effect of the prohibitory language, providing that an "agreement between the debtor and secured party which . . . makes the transfer a default" does not prevent a transfer of collateral by the debtor in breach of the agreement from being effective. The revised structure of the statute provides a much stronger implication that the transfer, even though effective, nevertheless constitutes a default under the debtor's agreement with the secured party. California's adoption of the uniform provision does not change the result from that which would obtain under the Prior California Code.

*B. Section 9406. Discharge Of Account Debtor; Notification Of Assignment; Identification And Proof Of Assignment; Term Prohibiting Assignment Ineffective*

Section 9406 addresses the issues addressed by Prior California Code Section 9318(4). Section 9318(4) is non-uniform; it extends the reach of Prior Uniform Code Section 9-318(4), which provides that contractual prohibitions on assignments of accounts or the creation of security interests in general intangibles for money due or to become due are unenforceable, by further providing that prohibitions on the creation of security interests in chattel paper are likewise unenforceable.

Revised Uniform Code Section 9-406(d) now addresses chattel paper in the same manner as does Prior California Code Section 9318(4): it provides that a term in an agreement or promissory note is ineffective to the extent that it "prohibits, restricts, or requires the consent of the account debtor" to the "creation, attachment, perfection, or enforcement of a security interest in, an account, chattel paper, payment intangible, or promissory note." As a result, Revised California Code Section 9406(d) is identical to the uniform provision.

## **CHAPTER 5 -- FILINGS**

There is no other area of practice under Article 9 where uniformity among the states will as easily and comprehensively promote efficiency of administration and consistency of results than to have a clear and consistent set of rules regarding filing. This will aid all parties: debtors, secured parties and subsequent searchers alike. One of the weaknesses of the current "uniform" regime is that different filing rules and practices are in effect in many states, and parties must risk rejection of their filings or do extensive research regarding local filing requirements, notwithstanding the general similarity. The filing rules of the Revised Uniform Code are designed to reflect both the strong need for uniformity and important policies regarding administration of filing offices across the country and the allocation of risks and burdens between filers, on the one hand, and searchers and other third parties, on the other hand. In balancing these interests, the Revised Uniform Code makes comprehensive changes regarding the manner in which filing offices are administered, making more information available to searchers, and

relying on the searchers themselves to make appropriate determinations regarding the information provided.

Except for minor variations adapting the language of uniform provisions to certain mechanics of the California filing system, the Revised California Code is uniform. Because the magnitude of the changes from prior law is so great, however, certain of the changes are discussed below.

#### *A. Section 9501. Filing Office*

Section 9501 provides for central (Secretary of State) filing except for filings that are fixture filings or that cover timber to be cut or as-extracted collateral (such as minerals). It differs from the Prior California Code only in that (i) it permits a security interest in fixtures to be perfected by means of a fixture filing made in the county where the affected real property is located, and (ii) the proper place to file on consumer goods and crops growing or to be grown will no longer be the county recorder's office, but instead will be the Secretary of State's office. Perfection of a security interest in fixtures by a county-level fixture filing provides certain priorities over the interests of owners and encumbrancers of the land on which the fixtures are located that are not achieved by a central filing. (Under the Prior California Code, a fixture filing would not perfect a security interest in fixtures or other property, but was limited in effect to providing the secured party with substantially the same priority benefits that are provided by a fixture filing under the Revised California Code.)

Permitting the perfection of a security interest in fixtures by a county-level fixture filing will help avoid mistakes by out-of-state practitioners ignorant of the unique central-filing-only perfection rule under the Prior California Code.

When the Prior Uniform Code was adopted in California in 1963, the legislature chose to adopt local filing for crops and consumer goods from among the several alternatives provided to them by the drafters. According to the California comments to the Prior California Code, local filing was chosen on the assumption that "most credit inquiries about local businesses, farmers and consumers come from local sources," and that "convenience is served by having files locally available." Although this rationale may have had some validity in 1963, it no longer accords with commercial realities in light of communication advances and changes in the consumer and agriculture financing industries. Indeed, both consumer credit and agricultural credit are extended not only across county lines but across state lines as well. The benefits of centralization of these types of filings are the same as with other personalty: the elimination of a local filing requirement permits secured parties to perfect all security interests with a single filing; and centralized filing eliminates the possibility of inadvertently filing in the wrong filing office within a state or in the wrong state's filing office because of the location of the debtor under the place of filing rules of the Revised Uniform Code.

#### *B. Section 9502. Contents Of Financing Statement; Mortgage As Financing Statement; Time Of Filing Financing Statement*

Revised California Code Section 9502 does not differ from Revised Uniform Section 9-502 with respect to the requisites of a fixture filing: in addition to the provisions that must be included in any financing statement, a fixture filing must (1) indicate that it covers this type of collateral, (2) indicate that it is to be recorded in the real property records, (3) provide a description of the related real property,

and (4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.

The Revised California Code eliminates a series of California non-uniformities contained in Prior California Code Section 9402, some of them substantive, that stem from California's non-uniform rule under the Prior California Code regarding the perfection of security interests in fixtures. For example, Prior California Code Section 9402(2), which provides when a financing statement is effective if signed by the secured party instead of the debtor, adds to the language of Prior Uniform Code Section 9-402(2) a reference to when a fixture filing is effective if signed by the secured party instead of the debtor--the non-uniformity is dictated by California's non-uniform rule regarding the perfection of security interests in fixtures. Several other non-uniform provisions were added to Section 9402 in 1985:

- Prior California Code Section 9402(5), which requires that a financing statement filed as a fixture filing recite that it is filed as a fixture filing or that it covers goods that are or are to become fixtures,
- Prior California Code Section 9402(8), which provides, generally (as does the uniform version), that minor errors in a financing statement which are not materially misleading will not render it ineffective, but which also states (evidently to make it clear that such omissions are not to be considered "minor errors") that a financing statement filed as a fixture filing is not effective unless it recites that it is to be recorded in the real estate records and that it is a fixture filing or covers goods that are or are to become fixtures,
- Prior California Code Section 9402(9) (a provision with no analog in the Prior Uniform Code), which limits the effect of a financing statement to the debtor's interest in the collateral, and
- Prior California Code Section 9402(10) (also having no analog in the Prior Uniform Code), which protects title companies who record financing statements in the real estate records on behalf of their customers from liability for having done so.

As stated above, these provisions are eliminated by the Revised California Code. With all non-real-estate-related filings under the Revised California Code now required to be made in the Secretary of State's office, such non-uniformities would have little relevance under the new regime.

### *C. Section 9516. What Constitutes Filing; Effectiveness Of Filing*

Prior California Code Section 9403(1) requires presentation of a financing statement, tender of the filing fee and acceptance of the statement by a filing officer for the financing statement to be "filed" for purposes of perfection. This differs from Prior Uniform Code Section 9-403(1), which requires only presentation and either tender of the filing fee or acceptance of the statement by the filing officer. Revised California Code Section 9516(a), on the other hand, is uniform, and, like Revised Uniform Code Section 9516(a) reflects the rule of Prior Uniform Code Section 9403(1).

Under the Prior California Code, a financing statement that is not accepted by the filing officer is not "filed," and there is no need to make a determination as to whether it was rightfully rejected or the

effect of the rejection on the filer and other parties. Under the new approach, specific grounds (subdivision (b)) are established under which filing offices are entitled (and required) to reject filings under Revised California Code Section 9520(a), thereby making clear whether rejection was proper. The effect of a wrongful rejection is codified in subdivision (d): wrongfully rejected records generally are effective, but third party purchasers of the collateral who give value in reliance upon the apparent absence of the record from the files are protected. As against such a person, subdivision (d) imposes upon the filer the risk that a wrongfully rejected record failed to make its way into the filing system. This risk is likely to be small, particularly when the record is filed electronically, and the filer can guard against this risk by conducting a post-filing search of the records. As further protection for the filer, Section 9520(b) requires the filing office to give prompt notice of its refusal to accept a record for filing.

This approach eliminates California's prior non-uniformity.

## **CHAPTER 6 -- DEFAULT ON SECURED OBLIGATION SUBJECT TO ARTICLE 9**

Perhaps more than any other Part of the Revised Uniform Code, the provisions of Part 6 (Chapter 6, in California legislative parlance) evidence the effect of the national compromise struck in the drafting process between consumer debtor and consumer creditor interests. The analysis that follows is not intended to be a comprehensive analysis of the default and enforcement provisions of the Revised California Code, but rather highlights those sections that either differ from the Revised Uniform Code or that reflect the adoption of uniform rules eliminating a material non-uniformity contained in the Prior California Code.

### *A. Section 9602. Waiver And Variance Of Rights And Duties*

Section 9602 lists those provisions of Division 9 of the Revised California Code providing protections to debtors or obligors, or imposing obligations on secured parties, that, except in limited circumstances (set forth in Section 9624), may not be waived by a debtor or obligor. Subdivision (13), in recognition of the non-uniform provisions of Revised California Code Section 9626 described below, adds language reflecting that in some circumstances a secured party may be barred from seeking a deficiency judgment.

### *B. Section 9604. Procedure If Security Agreement Covers Real Property*

Section 9604, dealing with the procedures that apply to enforcement of security interests in both real and personal property, corresponds to Prior California Code Section 9501(4). It differs in only minor details -- for example, references to "debtor" have been changed to references to both "debtor" and "obligor," in recognition of the fact that both terms, as defined in the Revised California Code, are required to encompass what previously was encompassed by "debtor" under the Prior California Code.

California's real property foreclosure rules and deficiency limitations have created a host of issues and problems in the enforcement of security interests in personal property when real property security is also involved, resulting in the highly non-uniform Prior California Code Section 9501(4). This non-uniformity has been continued in the Revised California Code. The personal property foreclosure procedures contained in Revised Uniform Code Sections 9-601 to 9-628 are set forth in markedly greater detail than is currently the case under Prior Uniform Code Sections 9-504 through 9-508, but they are nevertheless inadequate for California in the mixed collateral context. The following is a

detailed analysis of the issues that support the continuation of the non-uniform provisions of Section 9501(4).

In a "mixed collateral" transaction, a single debt is secured by both real property and personal property. In a typical mixed collateral transaction, a lender will hold a deed of trust on real property of the debtor and a security interest in personal property of the debtor, both to secure repayment of the same indebtedness. Mixed collateral transactions require interpretation of the intersection of the Prior California Code, regarding foreclosure of security interests on personal property, and of California's Civil Code and Code of Civil Procedure, regarding foreclosure of interests in real property.

Both the Prior Uniform Code and the Revised Uniform Code deal inadequately with the intersection under California law of the substantive and procedural rules governing real property and personal property foreclosures. California's real property foreclosure rules differ markedly from its personal property foreclosure rules. Nonjudicial foreclosure on real property requires recording and publication of a three-month notice of default and election to sell the real property, followed by a twenty-day notice of sale. The debtor has a right to reinstate the indebtedness until five days before the sale, even if the debt has been accelerated (Civil Code Sections 2924, 2924c, and 2924f); and CCP Section 580d bars entry of a deficiency judgment against the debtor following a nonjudicial foreclosure. Judicial foreclosure provides the debtor a right of redemption following the judicial sale, and permits the creditor, subject to fair value and appraisal limitations contained in CCP Section 726(b), to obtain a deficiency judgment following the sale. Moreover, the time required to complete a judicial foreclosure is dramatically different from the relatively short period in which a nonjudicial sale can be effected. On the other hand, a debtor who has provided personal property security has no right of reinstatement of an accelerated installment obligation, and only limited rights to notice and redemption. Unless the secured creditor fails to comply with simple foreclosure procedures or acts in a commercially unreasonable manner, the secured creditor ordinarily may recover a deficiency from the debtor.

Through 1985, California's version of Prior Uniform Code Section 9-501(4) read essentially like the uniform version, and provided simply that: "If the security agreement covers both real property and personal property or fixtures ... the secured party may proceed under this chapter as to the personal property or fixtures or he may proceed as to both the real property and the personal property or fixtures in accordance with his rights and remedies in respect of the real property in which case the provisions of this chapter do not apply." Official Comment No. 5 to Prior Uniform Code Section 9-504 noted that the purpose of subdivision (4) was to afford "simplicity and speed" by permitting--though not requiring--the secured party to foreclose on mixed collateral under a state's real property laws.

The efforts of courts to apply California's prior version of Section 9504 in a manner that would promote efficient and speedy foreclosure of security interests in mixed collateral transactions proved unsuccessful, leading to uncertainty in the law governing foreclosures on mixed collateral (*see, e.g., Walker v. Community Bank*, 10 Cal.3d 729 (1974)); and, ultimately, to the adoption of Prior California Code Section 9501(4) in 1985. The Legislative Counsel summarized the effect of the 1985 amendment as follows:

This bill would specify, with respect to obligations secured by both real property and personal property or fixtures, that the creditor may exercise several remedies. These would include (1) separate proceedings in any sequence against the

real property security and against the security that is personal property or fixtures, (2) an action for the judicial or nonjudicial foreclosure of some or all of the real property that would also include some or all of the personal property or fixtures, and (3) separate proceedings against a portion of the personal property or fixtures as provided in (1) and another portion thereof as provided in (2).

With prescribed exceptions, this bill would specify that provisions and limitations applicable to real-property collateral or security would not affect the exercise of rights and remedies under the Commercial Code as to security comprising personal property or fixtures. The bill would permit secured creditors to pursue remedies with respect to real property security while pursuing other remedies, except that the real property encumbrance would become unenforceable if the creditor obtains a monetary judgment on the debt, as defined, against the debtor. The bill would prescribe specified consequences of the creditor's realization of proceeds from the disposition of collateral that is personal property or fixtures.

*See generally* D. Arnold, M. Hirsch, E. Rabin, & H. Sigman, The U.C.C. Mixed Collateral Statute – Has Paradise Really Been Lost?, 36 UCLA L. REV. 1 (1988).

Revised Uniform Code Section 9-604(a) is virtually a verbatim adoption of Prior Uniform Code Section 9-501(4). It adds to the prior statute only the protection that a secured party who holds mixed collateral and proceeds under the UCC as to the personal property does so "without prejudicing any rights and remedies with respect to the real property." This is helpful, but it would not provide the comfort and roadmap that Prior California Code Section 9501(4) provides. As stated above, therefore, the non-uniform provisions of Section 9501(4) of the Prior California Code have been carried forward into the Revised California Code.

*C. Section 9608. Application Of Proceeds Of Collection Or Enforcement; Liability For Deficiency And Right To Surplus*

Section 9608 deals with the secured party's obligation to turn over excess cash realized from the collection or enforcement of obligations for the payment of money and with the secured party's right to a deficiency. California's version is non-uniform in two respects:

(1) in paragraph (4) of subdivision (a), it reflects the possibility that the obligor's liability for any deficiency is subject to Section 9626; and

(2) in subdivision (b) (as a component of the California Consumer Compromise) it carries forward the non-uniformity found in Prior California Code Section 9502(2)(h), providing that a secured party who has collected accounts subject to an execution lien need not turn over any excess proceeds of collection to the levying officer (as would otherwise be required under CCP Section 701.040) unless the security agreement provides that the debtor would have been entitled to the surplus. The reference in the additional clause to the "security agreement" mandates the inclusion of additional language in the first part of the subdivision.

*D. Sections 9610 (Disposition Of Collateral After Default), 9611 (Notification Before Disposition Of Collateral), 9612 (Timeliness Of Notification Before Disposition Of Collateral), 9613 (Contents And Form Of Notification Before Disposition Of Collateral: General), And 9614*



*(Contents And Form Of Notification Before Disposition Of Collateral: Consumer-Goods Transaction)*

Prior Uniform Code Section 9-504(3) requires that a secured party give a debtor "reasonable notification" of the time and place of any public sale or "reasonable notification" of the time after which any private sale or other intended disposition is to be made, and that all aspects of the disposition must be commercially reasonable; Prior California Code Section 9504(3), on the other hand, mandates certain minimum notice requirements, states where the sale must be held, and requires that notice of a public sale be published in newspapers of general circulation satisfying the requirements of that section. In addition, where Prior Uniform Code Section 9-504(3) provides that the secured party may purchase at a private sale any collateral that "is of a type" (1) "customarily sold in a recognized market" or (2) "which is the subject of widely distributed standard price quotations," Prior California Code Section 9504(3) deletes the words "of a type", and provides that the collateral may be purchased by the secured party at a private sale if it is (1) "customarily sold in a recognized market" or (2) "the subject of widely or regularly distributed standard price quotations."

Whether the distinction described in the last sentence of the preceding paragraph reflects a substantive difference between the Prior California Code and the Prior Uniform Code is not entirely clear. Prior Uniform Code Section 8-102(a)(15), for example, defines a security to include an interest that, among other things, "is, or is of a type, dealt in or traded on securities exchanges or securities markets"; and the stock of a privately-held corporation, even though it is not itself traded on a securities exchange or securities market, is generally acknowledged to constitute a "security" under that definition. It is possible, therefore, to infer that Prior Uniform Code Section 9-504(3) uses the words "of a type customarily sold in a recognized market" with the same meaning they have in Section 8-102, and to conclude if such inference were correct that under the Prior Uniform Code (but not under the Prior California Code<sup>5</sup>) a secured party would be able to purchase the stock of a privately-held corporation in a private sale. Such an inference, however, would seem to run absolutely contrary to the purpose behind the restrictions on a secured party's ability to purchase collateral in a private sale--to "prevent the creditor from acquiring the collateral at less than its true value or unfairly understating its value so as to obtain an excessive deficiency judgment." Allen v. Coates, 661 So. 2d 879, 884 (Fla. Ct. App. 1995). Moreover, courts that have considered the issue have held that the stock of a privately-held company may not be purchased by the secured party in a private sale. *See, e.g., Mercantile Bank & Trust v. Cunov*, 749 S.W.2d 545 (Tex. Ct. App. 1988), 6 UCC Rep. Serv. 2d 1001; Banker v. Upper Valley Refrigeration Co., Inc., 771 F. Supp. 6, 11 (D.N. Hamp. 1991). The better view is that the non-uniformity existing in Prior California Code Section 9504(3) is not indicative of an intent different from that embodied in Prior Uniform Code Section 9-504(3). The Revised California Code adopts the language set forth in the Revised Uniform Code, as discussed above; however, it is not apparent that this results in a substantive change in existing California law.

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<sup>5</sup> Since the Prior California Code prohibits the purchase of collateral by the secured party at a private sale unless the collateral itself is customarily sold in a recognized market (being "of a type" customarily sold in a recognized market is not sufficient), it clearly prohibits the secured party's purchase of privately-held stock at a private sale.

Revised California Code Sections 9610-9613 are uniform, and deal with dispositions of collateral after default. Section 9610(b) carries forward the general rule of the Prior Uniform Code that every aspect of the disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. Revised California Code Section 9612, however, now provides a safe harbor for the timeliness of notice in non-consumer transactions: notice of intended disposition given after default and at least 10 days before the earliest time of disposition set forth in the notice constitutes notice sent "within a reasonable time" before the disposition. In all other cases, whether a notice was sent within a reasonable time is a question of fact. Revised California Code Section 9613 describes the requisite contents of a notice of intended disposition in a commercial context, and provides a form of notice that is not mandatory but which contains "sufficient information." Unlike Prior California Code Section 9504(3), the Revised California Code does not require that notice be published and does not mandate the place of sale.

Revised California Code Section 9614 provides the requisite content, and a sufficient (but not mandatory) form of notice, for consumer goods transactions. In addition, Section 9614, as amended by Assembly Bill 2051 (Chapter 188, Statutes of 2000), contains nonuniform provisions relating to public sales of motor vehicles through retail channels and a special form of notice solely for those sales.

As to the secured party's right to purchase collateral at a private sale, both the Revised Uniform Code and the Revised California Code (at Section 9610(c)(2)) provide that the secured party may do so only if the collateral is "of a kind [instead of 'type'] that is customarily sold on a recognized market; or is the subject of widely distributed standard price quotations." The change in language was not intended to change the rules applicable to private sales.

*E. Section 9615. Application Of Proceeds Of Disposition: Liability For Deficiency And Right To Surplus*

Section 9615 contains rules governing the application of cash proceeds of dispositions of collateral and the debtor's liability for a deficiency following a disposition. Subdivision (f) provides a new rule for determining the appropriate surplus or deficiency following a disposition of collateral, in an otherwise complying commercially reasonable sale of collateral, to a secured party, a person related to the secured party, or a secondary obligor, if the price is significantly below the range of prices that a commercially reasonable foreclosure disposition to a third party would have brought. In such a situation (where the secured party may not have the incentive to maximize the proceeds of the disposition), the surplus or deficiency is based on the amount of proceeds that would have been realized in a complying disposition to an unrelated third party.

Section 9615 continues an existing California non-uniformity relating to the right of a lien creditor to reach any surplus to which a debtor might be entitled. Paragraph (3) of subdivision (a), paragraph (1) of subdivision (d), and paragraph (2) of subdivision (e) carry forward Prior California Code Sections 9504(2)(a) and 9504(2)(g), which subject the secured party's obligation to turn over excess proceeds to the debtor to the provisions of CCP Section 701.040 requiring that they be turned over to a levying officer, and permit a lien creditor to require such a turnover by giving notice of the underlying levy of attachment or execution to the secured party, as permitted under Prior California Code Section 9504(1)(c), instead of requiring in all cases that an "authenticated demand for proceeds" be delivered to the secured party, as is the case with Revised Uniform Code Section 9-615.

*F. Section 9625. Remedies For Secured Party's Failure To Comply With Article*

Pursuant to the California Consumer Compromise, Section 9625 omits from subdivision (c) the provision, contained in paragraph (2) of Revised Uniform Code Section 9-625(c), that sets a statutory penalty for a secured party's failure to comply with the Revised Uniform Code. The Prior California Code omits a similar provision contained in the Prior Uniform Code, and Revised California Code Section 9625 therefore reflects a continuation of an existing peculiarity of California law, rather than a change from prior law.

*G. Section 9626. Action In Which Deficiency Or Surplus Is In Issue*

Section 9626 deals generally with deficiencies and surpluses, assigning burdens of proof and providing rules for determining the amount of a debtor's liability for a deficiency. Subdivision (a) is uniform, and sets out the rules applicable to such issues in a suit arising from a nonconsumer transaction. Subdivision (b), however, is peculiar to California. Where the Revised Uniform Code merely states an intent to "leave to the court the determination of the proper rules in consumer transactions," Revised California Code Section 9626(b), pursuant to an agreement reached between representatives of California consumers and creditors, provides a list of conditions to be satisfied by the secured party if the debtor is to be liable for any deficiency. It continues California's current statutory bar of deficiency judgments in consumer transactions where the secured party has violated the provisions of Division 9 (*see* Prior California Code Section 9504(2)), and places the burden of establishing compliance with those provisions upon the secured party. As is the case under Prior California Code Section 9504(2)(f), moreover, a secured party's failure to effect a complying disposition of any item of collateral in a consumer transaction will expose him or her to the risk of having to disgorge the proceeds of subsequent dispositions of collateral securing the same obligation, in addition to the risk of having to pay damages if that subsequent disposition itself is noncomplying in any respect.

Subdivision (b) is not identical to current law, however. Under Prior California Code Section 9504(2)(d), the absolute bar rule is not limited to consumer transactions, but applies also to (i) commercial obligations, having a balance of \$100,000 or less, secured entirely by consumer goods, and (ii) commercial obligations having a balance of \$50,000 or less.

*H. Section 9629. Waiver Of Rights By Debtor With Respect To Consumer Goods*

Section 9629 has no analog in the Revised Uniform Code. It continues the current rule, under Prior California Code Section 9508, to the effect that a secured party must waive its right to a deficiency in return for any renunciation or modification of a debtor's rights under Chapter 6 with respect to consumer goods.